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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 512

JAMES BASHAM,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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Questions Presented

1. Was there sufficient evidence to support a jury finding that the platform on which the petitioner was standing moved?

2. If so, was it reasonably foreseeable that the platform on which the petitioner was standing would move in such a way as to cause petitioner to lose his balance, so that the respondent would be negligent in failing to protect against such movement?

Statement

This action was commenced under the Federal Employers' Liability Act on April 18, 1956 in the Supreme Court of the State of New York, County of Kings, to recover damages for personal injuries sustained by the plaintiff-petitioner during the course of his work for the defendant-respondent as a car Repairman's Helper, due allegedly to the negligence of the respondent (R. 3-5).

The case was submitted to the jury on the theory that the respondent was required under the Federal Employers' Liability Act to furnish the petitioner with a reasonably safe place to work and the issue involved was whether or not the respondent had failed in this duty by requiring petitioner to stand upon a platform on rails at the bottom of a wheel pit capable, according to the petitioner, of movement during the course of the work, so that the shifting of the platform could produce an accident such as the petitioner claimed (R. 82-84, 91). The specific claim of negligence was the alleged failure of the respondent to provide some hook or clamp or brake to fasten down the platform while the petitioner was working upon it so that it could not budge (R. 7, 83-84, 91).

At the end of the entire case, the respondent renewed its motion made at the end of the petitioner's case to dismiss the complaint, and also moved for a directed verdict in favor of the respondent. The Trial Judge, Honorable A. David Benjamin, denied the respondent's motion to dismiss the complaint and reserved decision on the respondent's motion for a directed verdict in its favor, permitting the case to go to the jury. The jury, by an eleven to one vote, returned a verdict in favor of the petitioner in the amount of $15,000. The court thereupon granted the respondent's motion to set aside the jury verdict in favor of petitioner and granted judgment in accordance with the respondent's motion for a directed verdict. Judge

Benjamin, with an opinion (R. 123-126), set aside the verdict of the jury, directed a verdict for the respondent dismissing the complaint and directed that judgment be entered for the respondent.

The petitioner appealed to the Appellate Division of the Supreme Court, Second Department from the judgment in favor of the respondent on February 5, 1958 in the Supreme Court, Kings County. The judgment for the respondent was affirmed by said Appellate Division, with Kleinfeld, J. dissenting, and an order affirming the judgment of the Supreme Court, Kings County, was entered on May 2, 1960. The petitioner further appealed to the Court of Appeals of the State of New York and on May 17, 1962 the Court of Appeals unanimously affirmed the judgment in favor of the respondent. This Court granted a writ of certiorari to the petitioner on October 15, 1962.

Petitioner, an employee of respondent, was working as a Car Repairman's Helper, with three other employees, in No. 3 wheel pit at Sunnyside Yard, Long Island City on January 7, 1956, and sustained injury during the process of changing a pair of wheels on a car (R. 13-14). The pit is an area between the rails which is dug away and permits the men to work underneath the car (R. 15). There is a platform at the bottom of the pit which has four wheels which run on two small rails, on which is an air hoist for removing the wheels from the car overhead (R. 15). The air hoist, which is permanently affixed to the middle of the platform, has an upright cylindical shaft which moves up and down on top of which is attached a cross-bar with prongs or forks at either end which fit on the axle of the wheels with the highest part of the forks furthest away from the center of the hoist (R. 15-16, 34, 40, Respondent's Exhibit A, R. 116). The horizontal bar is attached to the cylinder portion of the air hoist by a nut and bolt which allows some play between the cross-bar and the vertical cylinder (R. 15, 34-35, 45, 76). With the pair of wheels on the platform it takes four men to move it (R. 51).

After the removal of the old wheels, new wheels are then moved under the car on the platform and are raised into the pedestal lining of the truck of the car, the fixation point of the wheels, by the same air hoist (R. 16, 19, 24). The flanges of the journal box on each side of the pedestal linings on the truck fit with some play on the pedestal lining on each side of the truck (R. 38-39, 49, 73-74). The journal boxes are always rusty (R. 76). The journal box on petitioner's side was rusty, which caused the journal box to be tight against the pedestal lining (R. 33, 39, 48). The pit containing the rails on which the platform moves is 23 feet long, which allows back and forth movement of the 12 foot platform to take the wheels in and out of the pit, but allows no lateral movement of the platform (R. 19-21).

In order to remove or replace wheels on a car it is necessary to swing away a portion of the running rails, known as a gate rail (R. 22, 23). After the journal boxes, which are a part of the wheel assembly, were hoisted up and between the pedestal linings of the truck, petitioner and his mechanic put a coil spring, weighing approximately 110 pounds and approximately 2 feet in length, in its cup on the truck of the car and it was the petitioner's job to stand on the platform and hold this spring in place while the wheels are going up, to prevent the spring from kicking out (R. 24-25, 38, 39, Respondent's Exhibit E, R. 120). Respondent's Exhibits B and C are photographs which show the type of journal box involved in this case, with the journal box moved up into the pedestal lining in the position it was in just before the petitioner and his mechanic put the coil spring in the cup (R. 36-37, 52, Respondent's Exhibit B, R. 117, Respondent's Exhibit C, R. 118). Respondent's Exhibit E is a photograph showing a man holding a helical spring in approximately the same position as petitioner was holding the spring before his accident (R. 38, Respondent's Exhibit E, R. 120). There are lights which light up the area of the work, but no lights at the bottom of the pit (R. 66-67).

It is the custom and practice in this operation to hold the spring in place with one's hands and not with any tool or appliance and it could be done without putting one's fingers in the spaces of the spring (R. 25, 40, 80). There is no brake, clamp or hook to hold the platform in No. 3 pit in position while the wheels are being raised and no provision was made for any such in the design of the pit (R. 26, 79). Someone put a hook and eye in No. 2 pit to hold the platform in position, and this was in the pit for at least a year and was used by some men and not by others (R. 26, 46, 69, 70). When the platform was renewed, the eye was not renewed (R. 70).

Petitioner testified that while he was standing on the hoist platform holding the spring in place, the platform moved and he went off balance, that he caught his left hand on top of the gate rail and the spring came off and struck his finger (R. 25-26). Petitioner testified that he saw the platform move, but did not know which way it moved (R. 40). Petitioner, who worked in No. 3 pit for at least three months, had never been thrown off balance before (R. 27, 36).

One Charles J. Harper, one of the mechanics working with the petitioner at the time of the accident, was called as a witness on his behalf (R. 44). He testified that he did not see the petitioner hurt and knew nothing about the accident (R. 45). Harper was not on the platform at the time of the accident, but was sitting on a step next to the platform (R. 45-46). Harper testified that as he was operating the hoist in the operation, the platform that petitioner was standing on moved a little, but he could not determine which way it moved or how much it moved (R. 47). Shortly after the accident, Harper made a written statement to Foreman Keefer in which he did not say that the platform moved (R. 48, Respondent's Exhibit F, R. 121-123). Harper testified that the platform could be moved after the journal boxes were in the lining (R. 48). He testified that at the time of the

accident the journal box was about a quarter of the way up in the pedestal (R. 52). As far as Mr. Harper could see everything that was being done in the operation was being done in the correct way, but he did not know whether petitioner was working in a correct manner at the time of the accident because he could not see him (R. 53).

Petitioner's superior, Foreman Genova, testified that after the happening of the accident, petitioner told him that he was holding the spring with one hand and had the other hand on the gate rail and that the latter was struck by the spring, which jumped out (R. 62-63, 65). Genova testified that neither the petitioner nor Harper told him that the platform moved while they were doing the work (R. 66).

The respondent's expert, James W. Brenner, with 16 years' experience in the actual physical operation of repairing passenger cars, and with jurisdiction over the repair facilities to passenger cars, including No. 3 wheel pit, testified that with the wheels in the position which they were in at the time of the accident, as shown in Respondent's Exhibit C (R. 118), the platform could not move (R. 70-73, 78). That there is not more than a quarter of an inch of lateral movement between the journal box thrust lugs and the pedestal, and that the roller bearing assembly is pressed on the axle with about 50 to 70 tons pressure, forming an integral part of the wheel assembly, so that when the wheel is engaged in the pedestal the most movement you can have laterally is a quarter of an inch (R. 73-74). That once the journal box is moved into the pedestal, the platform is physically a part of the whole operation, and the maximum movement that can occur is a quarter of an inch (R. 74). That the platform will not move since you have the hoist moving the entire wheel assembly of a ton and a half with 110 pounds pressure into a truck of a car weighing 80 tons (R. 73-74). Mr. Brenner testified that similar pits on other points of the respondent's system, on the RF&P in Washington

and the New York Central Mott Haven Yard have no device to secure the pits (R. 79-80), and that the hook on No. 2 pit was put there to assure that the pit was in position when the men went to work and had nothing to do with the application or removal of wheels (R. 77).

Neither the nature of the petitioner's injuries nor the medical testimony have been included in this statement.

ARGUMENT

No negligence on the part of the respondent contributed to the happening of the petitioner's accident.

The petitioner argues that he proved a *prima facie* case on the trial and that the respondent raised at most only a question of fact which was resolved by the jury in his favor.

It is clear from the recent pronouncement of this Court in the case of *Inman* v. *Baltimore & Ohio R. Co.*, 361 U. S. 138, that the Federal Employers' Liability Act does not make a railroad employer an insurer and that negligence on the part of the defendant railroad must be shown by competent evidence before an employee plaintiff can recover.

This conclusion is buttressed by the holding of this Court in *New York, New Haven & Hartford R. Co.* v. *Henagan*, 364 U. S. 441.

It is claimed in this case that the respondent was negligent in failing to provide a clamp, brake or other locking device to prevent the platform on which the petitioner was working from moving, and that the platform did move during the course of the work, thereby causing injury to the petitioner.

The respondent respectfully submits that the proof in this case fails completely to establish any negligence on

its part which caused or contributed to the petitioner's accident for two reasons. First, because the platform could not, as a physical fact, move, and secondly, because the respondent could not reasonably foresee that the platform could move and cause injury to the petitioner.

(A) The platform did not move.

Although both the petitioner and his witness, Harper, testified that the platform moved, neither the petitioner nor Harper stated in which direction the platform moved or the extent of the claimed movement (R. 25, 40, 47).

Against the bald statements of the petitioner and Harper that the platform moved, we have the overwhelming proof that at the time of the accident, the platform was an integral part of the passenger coach weighing eighty tons and that it was held rigidly in place and could not move (R. 73-74).

Petitioner's counsel refers to the hoist platform on which the petitioner was standing as movable. Concededly, the platform was movable at certain times since the platform with a wheel assembly on it was moved by four men back and forth in the pit in the process of renewing wheels on cars (R. 15, 16, 20, 51). However, the petitioner's evidence established that at the time of the accident, the journal boxes on the wheels which were being inserted into the truck had moved at least as far up into the pedestal lining as in the position shown in Respondent's Exhibits B and C (R. 36, 52; Respondent's Exhibit B, R. 117, Respondent's Exhibit C, R. 118). The evidence is uncontradicted that with the wheels in such position, it was not physically possible for the platform to move (R. 72-73, 78).

One has only to look at the photographs of the apparatus involved, both those introduced by the petitioner (Petitioner's Exhibits 1 and 2, R. 113, 114) and those introduced by the respondent (Respondent's Exhibits A, B, C & E, R. 116, 117, 118, 120) to come to the firm realization

that the testimony of the petitioner and his witness to the effect that the platform moved, is incredible. In this connection it is to be noted that although the petitioner testified that he saw the platform move (R. 40) he also testified that he was holding a helical spring on its cup with both hands as shown in the photograph received as Respondent's Exhibit E (R. 38, Respondent's Exhibit E; R. 120) which put him in a position that made it practically impossible for him to see the platform.

The respondent respectfully submits that against the uncontradicted testimony that the platform was immovable, the testimony of the petitioner and his witness that the platform moved is in the words of this Court "too slender a reed" upon which to base a verdict for a plaintiff.

(B) The respondent could not reasonably foresee that the platform could move.

It is uncontested that the repair pit involved in this accident was of the type in general use in railroad yards throughout the country, and that no clamp, brake or other locking device was provided for in the design of such pit (R. 79, 80). There was a complete absence of testimony that an accident similar to that claimed by the petitioner had ever occurred either in any of the pits maintained by the respondent or in any similar pit maintained by any other railroad.

It is clear that a hook and eye could serve no useful purpose once the journal boxes had become interwoven with the pedestal linings as they had become at the time of the accident, because at that time all of the apparatus became rigidly fixed, with the exception of movement of the cylinder and the wheel assembly in an upward direction (R. 77). The respondent's evidence established that the hook and eye which had been installed in another pit was to assure that the platform was in a position when the men went to work, and that the hook had not been replaced when the table was renewed (R. 69, 77).

There was complete absence of any "probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did." (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.)

The evidence clearly demonstrates that the respondent could not reasonably foresee that the platform could move and cannot be charged with negligence under the circumstances. (*Brady* v. *Southern Ry. Co.*, 320 U. S. 476.)

The doctrine of reasonable foreseeability was again acknowledged by this Court in its denial of a writ of certiorari to the Pennsylvania Supreme Court in *Hoover* v. *Pennsylvania R. Co.*, 369 U. S. 873.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

DAVID J. MOUNTAN, JR.,
Attorney for Respondent.